IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARGARET DEMBECK-WEISS, et al.,	*	
	*	
Plaintiffs	*	
	*	
v.	*	**Civil No. CCB-06-3206**
	*	
UNITED STATES OF AMERICA, et al.,	*	
	*	
Defendants.	*	
	*	
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MEMORANDUM

This case arises from medical treatment Albert Tudor ("Tudor")[1] received at the Veteran's Administration Medical Center ("VAMC") and the University of Maryland Medical Systems ("UMMS") in Baltimore, Maryland between November 27, 2004 and January 2, 2006, the date of his death from complications from paraplegia. The siblings of Tudor, Margaret Dembeck-Weiss, Frances Paul, Rose T. Stanley, and Margaret Eichelberger (collectively "Plaintiffs") bring this suit against, *inter alia*, the United States (the "Government"), under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 thru 28 U.S.C. § 2683, alleging that it was negligence in the medical care provided by VAMC and UMMS that caused Tudor to deteriorate from a condition of weakness in his lower extremities to paraplegia.

The Government argues that this court lacks jurisdiction because Plaintiffs did not properly present their survival and wrongful death claims to the Veteran's Administration, as required by the

[1] Plaintiffs in their complaint use the name "Albert Tuder." (Compl. ¶¶ 1-30.) Defendant in its motion to dismiss uses the name "Albert Tutor." (Def.'s Mot. to Dismiss at 2-10.) Despite this inconsistency, this court will use the name "Albert Tudor" because this is the name used in the exhibits submitted by both parties and the name used by Plaintiffs in their opposition to Defendant's motion to dismiss and by Defendant in its reply memorandum in support of its dismissal motion.

FTCA under 28 U.S.C. § 2675(b). Further, the Government argues that even if the claims had been properly presented, Plaintiffs are not qualified beneficiaries who could sustain a wrongful death cause of action. The Government now moves to dismiss this suit under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and Fed. R. Civ. P. 12(b)(6) for failure to state a claim. The motions have been fully briefed and are ripe for decision, and no hearing is necessary. *See* Local Rule 105.6. For the reasons that follow, this court will deny in part and grant in part the Government's motion to dismiss. With respect to Count I of Plaintiffs' complaint pertaining to the survival claim brought by Dembeck-Weiss, the Government's motion will be denied. With respect to Counts II, III, and IV of Plaintiffs' complaint pertaining to the wrongful death claims brought by Paul, Stanley, and Eichelberger, the Government's motion will be granted. The Plaintiffs' recent motion to amend the complaint to add Tudor's children as "use plaintiffs" will be denied.

I. Background

Plaintiffs allege that on November 24, 2004, Tudor arrived in the emergency department of VAMC, where he had formerly been treated for methycillin resistant staphylococcus aureus (an antibiotic-resistant staph infection)[2] resulting from previous spinal surgeries. (Compl. ¶ 7; Def.'s Mot. to Dismiss, Ex. 1, "Tudor SF-95.") Tudor reported feeling pain and weakness in his lower extremities and upon examination was determined to have sacral decubti (skin ulcers from lying in one position too long)[3] and chronic spinal pain. (Compl. ¶ 5.) He was released for outpatient care. (*Id*.)

[2]"Overview of Healthcare-associated MRSA", Centers for Disease Control and Prevention, http://www.cdc.gov/ncidod/dhqp/ar_mrsa.html (March 26, 2007).

[3] "Definition of Decubitus Ulcer", MedicineNet, http://www.medterms.com/script/main/art.asp?articlekey=20744 (March 26, 2007).

On November 28, 2004, Tudor again arrived at VAMC reporting a progression of the same symptoms. (*Id.* ¶ 6.) On November 29, 2004, the VAMC medical team examining Tudor determined the possibility of sepsis (a systemic inflammatory response to infection)[4] and also informed the VAMC neurosurgical team of a deterioration in Tudor's neurological condition and the sensory motor condition of his lower extremities. (*Id.* ¶¶ 7, 10.)[5] The VAMC medical team ordered a stat (urgent) magnetic resonance imaging (MRI) scan of Tudor's spine to be performed by the UMMS radiology department. (*Id.* ¶ 11.) However, there was a delay in performing the MRI. (Def.'s Mot. to Dismiss, Ex. 1, "Tudor SF-95.")

On the morning of November 30, 2004, the VAMC neurosurgical team learned that the MRI had not yet been conducted and noted that Tudor's neurological condition had deteriorated so that he was a paraplegic with neurogenic bowel and bladder. (Compl. ¶ 13.) The MRI was conducted on the evening of November 30, 2004, and indicated an abscess was compressing Tudor's spinal cord. (*Id.* ¶ 14.) Tudor was referred to UMMS for surgery to decompress the spinal cord abscess on December 1, 2004, and the surgery was performed on December 4, 2004.[6] Following the surgery, Tudor did not regain the function of his lower extremities and remained hospitalized. (*Id.* ¶ 16.)

Tudor completed a Standard Form 95 ("SF-95"), the federal form used to present a tort claim for damage, injury, or death, in which he identified himself as the sole claimant and asked for three million dollars for his personal injury, dating the document June 20, 2005. (Def.'s Mot. to Dismiss,

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[4] "Definition of Sepsis", MedLinePlus Medical Encyclopedia, http://www.nlm.nih.gov/medlineplus/ency/article/000666.htm (March 26, 2007).

[5] Tudor's SF-95 states that a CT scan was performed on November 29, 2004, but this fact is not alleged in the Complaint. (Def.'s Mot. to Dismiss, Ex. 1, "Tudor SF-95.")

[6] Tudor's SF-95 reports the date of the surgery as December 3, 2004. (Def.'s Mot. to Dismiss, Ex. 1, "Tudor SF-95.")

Ex. 1, "Tudor SF-95.") Dembeck-Weiss, his sister, was described on Tudor's SF-95 as a witness and signed her signature next to Tudor's in the "Signature of Claimant" section of the form. (*Id*.) The Tudor SF-95, which alleged negligence on the part of VAMC health care providers in not timely performing the MRI or spinal cord abscess decompression surgery, among other medical procedures, was sent via certified mail by his counsel, Littlepage & Associates, to the Department of Veterans Affairs (the "VA") on August 22, 2005. (*Id*.) The Tudor SF-95 was filed with the VA on August 24, 2005. (Def.'s Mot. to Dismiss at 2.) On August 31, 2005, the VA mailed Tudor's counsel a letter acknowledging receipt of his administrative tort claim and stating that the claim would be processed in accordance with the FTCA, 28 U.S.C. §§ 1346(b), 2671-2680, and the Attorney General's Regulations, 28 C.F.R. §§ 14.1-14.11. (Def.'s Mot. to Dismiss, Ex. 2, "August 31, 2005 Letter.")

Tudor died on January 2, 2006 from complications stemming from his paraplegia. (Compl. ¶ 16.) In a letter dated January 4, 2006, Tudor's counsel, Diane M. Littlepage ("Littlepage"), informed VA that her law firm would be filing amended SF-95's "alleging a survival action on behalf of his family." (Def.'s Mot. to Dismiss, Ex. 3, "January 4, 2006 Letter.") On March 1, 2006, Littlepage wrote the VA again, stating that she would be "forced to file suit no later than August 1, 2006" because "the statute of limitations" would "expire before the six (6) months" the VA had to review and accept or deny Tudor's claim. (Def.'s Mot. to Dismiss, Ex. 4, "March 1, 2006 Letter.") In this letter, which was received by the VA on March 15, 2006, Littlepage also (1) reiterated the intent of her law firm to file amended SF-95's listing Tudor's siblings as claimants and (2) asked the VA to advise her on the status of the review of Tudor's claim. (*Id*.)

On January 24, 2007, the VA sent a letter via certified mail to Littlepage informing her that because it had, despite the passage of a sufficient amount of time, never received "a new or amended

claim on behalf of the estate and/or surviving relatives, the personal injury claim brought on behalf of [Tudor] ceased to exist at the time of his death" and would be denied pursuant to 28 C.F.R. 12.3 (Def.'s Mot. to Dismiss, Ex. 5, "January 24, 2007 Letter.") The letter also advised Littlepage that she had the option to file a request for reconsideration, in which case the VA would have six months from the date of filing to dispose of the claim and Littlepage's option to file suit on behalf of Tudor in an appropriate district court would accrue six months after the filing of the request for reconsideration. (*Id*.) The letter further advised Littlepage that she had the option to file suit in accordance with the FTCA, 28 U.S.C. §§ 1346(b), 2671-2680, but that such a suit would need to be initiated within six months of the date of the letter pursuant to 28 U.S.C. § 2401(b). (*Id*.)

Littlepage on January 29, 2007 responded to the VA with a letter sent via facsimile stating that suit had already been filed since it had been "more than six (6) months since the filing of the administrative claims" but she was still requesting a reconsideration of the denial of Tudor's claim. (Def.'s Mot. to Dismiss, Ex. 6, "January 29, 2007 Letter and Attachments.") Littlepage also stated that a claim for Tudor's estate and his survivors had in fact been sent in March 2006, and submitted copies of a March 29, 2006 letter and amended SF-95's for claimants Eichelberger, Dembeck-Weiss, and Stanley, who are plaintiffs in the instant action. (*Id*.)[7] There was apparently no SF-95 submitted for Paul, also a plaintiff in this case. In the March 29, 2006 cover letter, signed by a legal assistant of Littlepage & Associates and described as being sent via certified mail, it requests that the enclosed extra copies of the SF-95's be date stamped and returned. (*Id*.)

The Government, through a sworn affidavit by the regional counsel of the VA who maintains custody of FTCA claims filed in Maryland, the District of Columbia, and Virginia, contends that the

[7] These SF-95's contain the same three million dollar claim for "personal injury" and add $850,000.00 for "wrongful death." (Def.'s Mot. to Dismiss, Ex. 7.)

VA never received the March 29, 2006 mailing from Littlepage & Associates. (Def.'s Mot. to Dismiss, Ex. 7, Giorno Aff., ¶ 5.) Further, the VA contends that since its office practice is to send "acknowledgment letters" in response to every claim and amended claim received, such as the one it sent following Tudor's August 24, 2005 filing of his personal injury claim, Littlepage & Associates would have received a letter in response to the March 29, 2006 mailing of amended claims had it been sent, as alleged by Plaintiffs. (*Id*. ¶¶ 7-9.)

Plaintiffs, in their response in opposition to the Government's motion to dismiss, concede that "the assistant sending the claim failed to send the claim by certified mail" but maintain that the amended SF-95's were sent, and there is no statutory requirement that certified mail be used. (Pl.'s Resp. in Opp. to the Mot. to Dismiss of Def. ¶¶ 1-3.) The Government states that, though there is no statutory certified mailing requirement, the VA has "no record of receiving the claims . . . and the Plaintiffs have no evidence that they ever sent the claims, let alone that the [VA] received the claims[.]" (Def.'s Reply Mem. in Supp. of Mot. to Dismiss at 2.) Plaintiffs, on this point, contend that they provided sufficient "notice" to the VA of their claims in the August 24, 2005 filing of the Tudor claim for personal injury; the March 29, 2006 mailing of the Eichelberger, Dembeck-Weiss, and Stanley claims that the VA maintains was never received; and the January 4, 2006 letter notifying the VA that Tudor had died and amended SF-95's alleging a survival action would be filed on behalf of his family. (Pl.'s Mem. in Supp. of Pls.' Resp. in Opp. to Def.'s Mot. to Dismiss at 3.)[8]

[8] These assertions and counter-assertions are no longer being pressed, however, as Paul, Stanley, and Eichelberger have effectively withdrawn their wrongful death claims. (Pl.'s Mot. for Leave to Amend. at 1.)

II. Analysis

A.

The Fourth Circuit has summarized the standard for reviewing a Rule 12(b)(1) motion contesting the factual basis for subject matter jurisdiction as follows:

> When a Rule 12(b)(1) motion challenge is raised to the factual basis for subject matter jurisdiction, the burden of proving subject matter jurisdiction is on the plaintiff. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). In determining whether jurisdiction exists, the district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment. *Id.*; *Trentacosta v. Frontier Pacific Aircraft Indus.*, 813 F.2d 1553, 1558 (9th Cir. 1987). The district court should apply the standard applicable to a motion for summary judgment, under which the nonmoving party must set forth specific facts beyond the pleadings to show that a genuine issue of material fact exists. *Trentacosta, supra*, 813 F.2d at 1559 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)). The moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law. *Trentacosta, supra*, 813 F.2d at 1558.

Richmond, Fredericksburg and Potomac R.R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991).

B.

"As a sovereign, the United States is immune from all suits against it absent an express waiver of its immunity." *Welch v. United States*, 409 F.3d 646, 650 (4th Cir. 2005). The FTCA creates a limited waiver of sovereign immunity by permitting a claimant to bring a civil suit seeking money damages against the United States "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment" to the extent that a private party would be liable for those acts under state law. 28 U.S.C. § 1346(b)(1). All waivers of sovereign immunity must be "strictly construed . . . in favor of the sovereign." *Welch*, 409 F.3d at 650 (quoting *Lane v.*

Pena, 518 U.S. 187, 192 (1996)). "When subject matter jurisdiction is challenged under the FTCA," as it is in the instant action, "the plaintiff bears the burden of persuasion and must establish an unequivocal waiver of immunity with respect to his claim." *Lumpkins v. United States*, 215 F.Supp.2d 640, 642 (D.Md. 2002).

Courts have identified two conditions that must be met to establish a waiver of the Government's sovereign immunity in FTCA cases. *Shipley v. United States Postal Serv.*, 286 F.Supp.2d 657, 660-661 (M.D.N.C. 2003). The first condition is compliance with FTCA requirements to exhaust administrative remedies. The requirement to file an administrative claim is jurisdictional and cannot be waived. *Id*. at 661 (citing *Henderson v. United States*, 785 F.2d 121, 123 (4th Cir. 1986)). The FTCA "requires that before an action may be commenced in court, the claimant must 'present' his claim to the appropriate administrative agency for determination." *Ahmed v. United States*, 30 F.3d 514, 516 (4th Cir. 1994) (citing 28 U.S.C. § 2675(a)). A claim is considered 'presented' when the Government, through a federal agency, "receives from a claimant . . . an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident." 28 C.F.R. § 14.2(a). A "claimant meets his burden if the notice '(1) is sufficient to enable the agency to investigate and (2) places a 'sum certain' value on [his] claim.'" *Ahmed*, 30 F.3d at 516-17 (citations omitted).

The second condition to establish a waiver of the Government's sovereign immunity is compliance with FTCA requirements to present a tort claim against the Government in writing to the appropriate federal agency "within two years after such claim accrues . . . ." 28 U.S.C. § 2401(b); *Muth v. United States*, 1 F.3d 246, 249 (4th Cir. 1993) ("The FTCA explicitly provides that a tort

claim is 'forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues. . . .'"). An FTCA claim accrues when the claimant knows or should reasonably know of the injury and its cause. *Gould v. United States Dep't of Health & Human Servs*., 905 F.2d 738, 742 (4th Cir.1990)(en banc) ("[A] claim accrues within the meaning of § 2401(b) when the plaintiff knows or, in the exercise of due diligence, should have known both the existence and the cause of his injury."). Both the Supreme Court and the Fourth Circuit have required strict compliance with the FTCA's procedural requirements. *See McNeil v. United States*, 508 U.S. 106, 113 (1993) (affirming dismissal where pro se plaintiff failed to "strict[ly] adhere[ ] to [FTCA's] procedural [and timing] requirements"); *Gould,* 905 F.2d at 744-45 (holding plaintiff's claims against federal agency and employees were time barred under 28 U.S.C. § 2401(b)); *see also Muth,* 1 F.3d at 249 (stating "each claimant must individually satisfy the jurisdictional prerequisite of filing a proper claim, unless another is legally entitled to assert such a claim on their behalf").

C.

As previously noted, the VA, in its denial letter to the Tudor estate, wrote that the "personal injury claim brought on behalf of [Tudor] ceased to exist at the time of his death" and there was never an amended claim on behalf of the estate or surviving relatives submitted. (Def.'s Mot. to Dismiss, Ex. 5, "January 24, 2007 Letter.") Based on the record and applicable case law, however, I am not convinced that Tudor's personal injury claim, now a "survival" claim, must be dismissed.

First, there are no deficiencies in the personal injury claim brought by Tudor in the SF-95 he filed with the VA in August 2005. The Tudor SF-95, in its "Basis of Claim" section, presents sufficiently detailed written information for the VA to investigate Tudor's claim and, in its "Amount of Claim" section, seeks a sum certain amount for his personal injury of three million dollars. (Def.'s

Mot. to Dismiss, Ex. 1, "Tudor SF-95.") Dembeck-Weiss is identified on Tudor's SF-95 as a witness and her signature is legibly signed next to Tudor's own signature in the "Signature of Claimant" section of the form. (Def.'s Mot. to Dismiss, Ex. 1, "Tudor SF-95.") Further, the details of the claim brought by Dembeck-Weiss in her survival action on behalf of Tudor's estate did not change from the time that Tudor filed his SF-95 with the VA, and the VA was notified in a timely manner in the January 4, 2006 letter from Tudor's attorney that Tudor had passed away and that a "survival action on behalf of his family" would be forthcoming. (Def.'s Mot. to Dismiss, Ex. 3, "January 4, 2006 Letter.") Thus, both during Tudor's lifetime and from the time shortly following his death, the VA was put on written notice as to the details of the Tudor personal injury claim, which the VA was then made aware would become a survival claim, as well as the sum certain amount requested, in compliance with the claim presentment requirements of the FTCA pursuant to 28 U.S.C. § 2675(a).

In examining FTCA cases where suit is brought on behalf of a decedent's estate or a family member, courts have held that, so long as basic claim presentment prerequisites have been satisfied, a court maintains subject matter jurisdiction over the claim, even if not initially presented by a properly identified and authorized representative. *See, e.g.*, *Goodman v. United States*, 298 F. 3d 1048, 1055 (9th Cir. 2002) (noting the "person injured, or his or her personal representative, need only file a brief notice or statement with the relevant federal agency containing a general description of the time, place, cause and general nature of the injury and the amount of compensation demanded"); *see also Byrne v. United States*, 804 F. Supp. 577, 582 (S.D.N.Y. 1992) (holding that "[a]lthough plaintiff was not the personal representative of the decedent at [the time FTCA claim filed], his submission provided the government with the minimal notice required under the FTCA

so that it could adequately investigate the claim . . . . plaintiff was the decedent's duly appointed executor").

Discussing the claim presentment requirements under 28 U.S.C. § 2675(a), the district court in South Carolina recently observed that though the Fourth Circuit has not yet explicitly addressed this issue, "the majority of circuits [ ] have now held that there is no jurisdictional requirement that an administrative claim be filed by the personal representative of an estate . . . . the failure to file a survival or wrongful death claim under the FTCA by the person authorized by state law does not defeat the district court's subject matter jurisdiction." *Dawson v. United States*, 333 F. Supp. 2d 488, 493 (D.S.C. 2004). In another case from the Southern District of West Virginia, the court held, *inter alia*, that under West Virginia law a widow's appointment as the administrator of her husband's estate related back to the date of her original administrative claim for wrongful death against the VA to determine whether her claim had been filed within the two-year limitations period under 28 U.S.C. § 2675(a), noting that (1) the VA knew about the claim before the limitations period had passed, and (2) the only issue was that the widow had not been legally appointed administrator until after the limitations period had run. *McDavid v. United States*, 292 F. Supp. 2d 871, 876-77 (S.D. W. Va. 2003). Specifically, the court stated that "it [was] beyond dispute the Government knew of the wrongful death claim and the sum-certain amount being requested within the two-year statute of limitations . . . the Government cannot, and does not, contend that the Veterans Administration could not have investigated the claim and, if warranted, determined an appropriate settlement amount." *Id*. at 877.

State law applies to claims brought under the FTCA. *Metz v. United States*, 723 F. Supp. 1133, 1137 (D. Md. 1989). It is a long-standing principle under Maryland law that the personal

representative of a decedent, in bringing a survival action, stands in the shoes of the decedent for purposes of a claim the decedent brought or could have brought while living. Unlike the wrongful death claims Tudor's siblings attempted to assert, the survival action is a continuation of the claim Tudor filed on his own behalf before he died. As the Maryland Court of Appeals has explained:

> Under the [wrongful death statute,] the damages recoverable are such as the equitable plaintiffs have sustained by the death of the party injured. Under [the survival statute] the damages recoverable are such as the deceased sustained in his lifetime and consequently exclude those which result to other persons from his death. Under the [wrongful death statute] the damages are apportioned by the jury among the equitable plaintiffs, and belong exclusively to them and form no part of the assets of the decedent's estate; under [the survival statute] the damages recovered go into the hands of the executor or administrator and constitute assets of the estate. Under [the wrongful death statute,] there is no survival of a cause of action-the cause of action is created by it and is a new cause of action and consequently one *475 which the deceased never had; under [the survival statute] there is a survival of a cause of action which the decedent had in his lifetime.

Beynon v. Montgomery Cablevision Ltd. P'ship, 718 A.2d 1161, 1168 (Md. 1998) (quoting *Stewart v. United Elec. Light & Power Co.*, 65 A. 49, 52 (1906)). In short, "a survival action is the decedent's cause of action brought on his behalf after his death . . . the decedent is the claimant, and the personal representative merely his agent." *Benjamin v. Union Carbide Corp.*, 873 A.2d 463, 480 (Md. Ct. Spec. App. 2005) (stating "even though the action is brought after death, a survival action may accrue before the decedent dies because the claim arises out of personal injuries sustained by the decedent during his lifetime").

Applied to the instant action, this court is convinced that Dembeck-Weiss satisfies both conditions required by the FTCA to establish a waiver of sovereign immunity because Tudor properly presented his claim to the VA, and Dembeck-Weiss is the personal representative of Tudor's estate. The fact that she also signed the Tudor SF-95 submitted while Tudor was still living and that the VA was notified by Tudor's attorney that a survival action would be forthcoming

following Tudor's death provides further evidence that "the Government knew of the claim, [and] the Government cannot contend that it was unaware or surprised by the claim." *McDavid*, 292 F. Supp. 2d at 877.

Accordingly, with respect to the survival action claim brought by Dembeck-Weiss, the administrative procedures required by the FTCA have been satisfied such that this court may assume subject matter jurisdiction, and the Government's motion will be denied as to Count I.

D.

Plaintiffs Paul, Stanley, and Eichelberger (hereinafter "Plaintiffs PSE") have failed to establish that the Government has waived its sovereign immunity because they proffer no credible evidence to this court that they properly presented their wrongful death claims to the VA following Tudor's death in January 2006. While Plaintiffs Stanley and Eichelberger may argue that they did properly submit amended SF-95's with sum certain amounts pertaining to the wrongful death claims to the VA in the contested mailing of March 29, 2006,[9] there is no independent evidence presented to this court – not even a sworn affidavit from the legal assistant – that the mailing took place. In any event, the material question is not whether a mailing was sent, but whether it was received. *See, e.g.*, *Moya v. United States*, 35 F. 3d 501, 503 (10th Cir. 1994) (concluding that because plaintiff could "not produce a certificate of mailing, a return receipt, a certified mail number or any acknowledgement by the defendant of having received the request . . . [t]here [was] no independent evidence in the record indicating that plaintiff's request was ever sent, let alone received by defendant"); *Bailey v. United States*, 642 F.2d 344, 346-47 (9th Cir. 1981) (plaintiff has the burden

[9] As previously noted, there was no SF-95 for Paul, the other plaintiff in this case, submitted or alleged to have been submitted.

of establishing presentment); *Crack v. United States*, 694 F. Supp. 1244, 1246 (E.D. Va. 1988) (claim alleged to have been mailed by claimant not received by agency; presentment requires receipt of mailing).

In any event, Plaintiffs PSE have effectively withdrawn their wrongful death claims, arguing that any potential claims they could have brought have been supplanted by Tudor's two adult children. (Pl.'s Mot. for Leave to Amend at 1.) Littlepage asks this court, without any citation to caselaw or other legal authority, for permission to insert these children as "use plaintiffs" into the litigation. (Pls.' Surreply in Opp. to Def.'s Mot. to Dismiss at 2.) Given that Littlepage, by her own admission, "does not represent the children of Mr. Tudor," there is no basis for this court to grant Plaintiffs' motion to amend their complaint to bring suit on behalf of the children.[10]

III. Conclusion

For the reasons stated above, the motion to dismiss brought by the Government will be denied in part and granted in part; the Plaintiffs' motion to amend will be denied. A separate order effectuating the rulings made in this memorandum is being entered herewith.

May 21, 2007
Date

/s/
Catherine C. Blake
United States District Judge

[10] In light of the above rulings, it is unnecessary to reach other issues, in particular whether Plaintiffs Paul, Stanley, and Eichelberger are even qualified beneficiaries entitled to bring a wrongful death action.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARGARET DEMBECK-WEISS, et al.,	*	
	*	
Plaintiffs	*	
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v.	*	**Civil No. CCB-06-3206**
	*	
UNITED STATES OF AMERICA, et al.,	*	
	*	
Defendants.	*	
	*	
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For reasons stated in the foregoing Memorandum, it is hereby ORDERED that:

1. the Government's Motion to Dismiss (docket entry no. 12) is GRANTED as to Counts II – IV (wrongful death) and DENIED as to Count I (survival);
2. the Plaintiffs' wrongful death claims are DISMISSED; and
3. the Plaintiffs' Motion to Amend (docket entry no. 28) is DENIED.

May 21, 2007
Date

/s/
Catherine C. Blake
United States District Judge